BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Application by SBC Communications, Inc.,	)	
Pacific Bell Telephone Company,	)	
And Southwestern Bell Communications	)	WC Docket No. 02-306
Services, Inc. for	)	
Provision of In-Region, InterLATA	)	
Services in California	)	
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COMMENTS OF XO CALIFORNIA, INC.

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October 9, 2002

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COMMENTS OF XO CALIFORNIA, INC.

Pursuant to Public Notice DA 02-233,[1] XO California, Inc., ("XO") submits these comments on the Application ("Application") by SBC Communications, Inc., Pacific Bell Telephone Company, and Southwestern Bell Communications Services, Inc. (collectively, "SBC Pacific"). For the reasons discussed below, XO opposes the SBC Pacific Application and urges the Commission to deny the Application.

I. INTRODUCTION AND SUMMARY

In order to grant the SBC Pacific Application, the Commission would have to ignore significant and overwhelming evidence against such an action as well as the plain requirements of the law. The Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("1996 Act")[2] (collectively, the "Act"), requires the opening of local telecommunications

[1] Public Notice, Comments Requested on the Application by SBC Communications Inc. for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of California, WC Docket No. 02-306 (Sept. 20, 20002) (comments due Oct. 9, 2002; reply comments due Nov. 4, 2002).

[2] *See* Telecommunications Act of 1996, Pub. L. 104-104, 110 Stats. 56, codified at 47 U.S.C. §§ 251 *et seq.* ("1996 Act").

markets to competition. Accordingly, the Act requires, among other things, that a Bell Operating Company ("BOC") must comply with *each* of the items on the 14-point checklist of Section 271 of the Act,[3] and that the BOC's entry into the in-region interLATA market be consistent with the public interest, convenience, and necessity. SBC Pacific's claims notwithstanding, the evidence regarding SBC Pacific's services and performance in California precludes the Commission from finding that SBC Pacific has satisfied all of the Act's requirements.

One of the glaring deficiencies in the record is SBC Pacific's pricing of high capacity DS1 and DS3 UNE loop facilities. The prices for these facilities are so high, any argument that they meet the cost-based standard of Section 251(d)(1) is untenable at best. Indeed, SBC Pacific's DS3 price is very likely the highest price charged for that facility by any BOC in the nation. Given the critical role such high capacity facilities play in allowing XO and other CLECs a meaningful opportunity to compete in the local telecommunications market, there should be little doubt that SBC Pacific's exorbitant pricing of these facilities precludes a finding of compliance with the Act.

Other shortcomings of SBC Pacific's Application similarly compel a finding that the Application should be rejected. Specifically, the evidence in the record regarding SBC Pacific's UNE loop provisioning and maintenance and repair demonstrates that SBC Pacific has not satisfied the requirements of checklist item 2. In addition, the evidence regarding SBC Pacific's telephone number porting processes shows that SBC Pacific also has not satisfied checklist item 11. Such evidence notably includes the California Public Utilities Commission ("CPUC")'s finding to this effect.[4] The same is true for SBC Pacific's compliance with its resale obligations

[3] 47 U.S.C. § 271(c)(2)(B).

[4] On September 19, 2002, the CPUC issued its decision finding that SBC Pacific had only satisfied 12 of

under the Act. The Commission should conclude, as did the CPUC, that SBC Pacific has not met checklist item 14.

Finally, significant evidence in the record dictates that it would not be in the public interest to grant SBC Pacific's Application. Notably, the performance incentive plan adopted for SBC Pacific in California is in fact inadequate to ensure adequate performance by SBC Pacific or to prevent backsliding. Moreover, the CPUC found that it could not – based on almost five years of record evidence – conclude that SBC Pacific had complied with California's own statutory requirements for in-state long-distance entry, because it could not conclude that SBC Pacific had not engaged in anticompetitive behavior; that there was no improper cross-subsidization; or that there was not the substantial possibility of harm to the competitive intrastate interexchange market in California. This Commission further should not ignore evidence that local competition has not been fully and irreversibly attained in California, and that grant of the Application would be contrary to the public interest. In this regard, it is crucial that the Commission not ignore the critical facts and conclusions of the CPUC as well as that of the CPUC President Lynch that "actual local competition" does not yet exist in California and that "true competition remains an elusive goal for many telecommunications services in California,"[5] and that President Lynch "cannot find that it would be in the public interest to support the

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the 14-point checklist items of Section 271 of the Act and that SBC Pacific had failed to satisfy Section 709.2 of the California Public Utilities Code. *See* CPUC Decision No. 02-09-050, Decision Granting Pacific Bell Telephone Company's Renewed Motion For An Order That It Has Substantially Satisfied The Requirements Of The 14-Point Checklist In § 271 Of The Telecommunications Act Of 1996, CPUC R.93-04-003, I.93-04-002, R.95-04-043, I.95-044 ("CPUC 271 proceeding") (September 19, 2002) ("D.02-09-050" or "CPUC 271 Decision").

[5] *See The Status of Telecommunications Competition in California*, Testimony of Loretta Lynch, President, California Public Utilities Commission, Before the Senate Committee on Energy, Utilities, and Communications (June 10, 2002) ("Pres. Lynch Senate Testimony").

[CPUC's 271] decision as a whole."[6]

As discussed below, the foregoing significant deficiencies in SBC Pacific's Application lead to the inescapable conclusion that the Application must be rejected.

II. XO CALIFORNIA, INC.'S INTEREST IN THIS PROCEEDING

XO's parent corporation, XO Communications, Inc., has metropolitan broadband fiber optic networks in more than 60 cities in the United States, including in the top 30 cities, and serves 26 of the largest metropolitan areas in the United States. XO is one of the few facilities-based competitive local exchange carriers ("CLECs") expected to survive the fall-out in the competitive telecommunications industry in California. XO has been operating in California since 1997 when XO began offering services in the Los Angeles and Orange County markets. Since 1997, XO has built networks and has begun offering local exchange services in competition with SBC Pacific in the San Francisco, San Diego, and Sacramento markets. XO has invested a significant amount of capital in California, including the deployment of five DMS 500 switches and the installation of 813 route miles.

XO's continued existence demonstrates that the Act has to some extent been successful in facilitating competitive entry into the local telecommunications markets. But, in order to gain competitive entry, XO has had to battle SBC Pacific's obstructionist practices and impediments every step along the way. XO has also participated throughout the CPUC's proceeding addressing SBC Pacific's Section 271 process in order to provide its input on its experiences as a wholesale customer and competitor of SBC Pacific. Although SBC Pacific has made some progress in meeting the requirements for Section 271 approval, for the most part, XO and other CLECs continue to face significant barriers to entry in SBC Pacific's operating territory, which

[6] D.02-09-050, Dissent of Pres. Lynch at 6.

will not abate and will likely only be further increased, once SBC Pacific gains entry into the in-region long distance market. Before the Commission can conclude that SBC Pacific's entry into the California interLATA market is warranted, it must find that SBC Pacific's local exchange market is fully and irreversibly open to competition, that appropriate safeguards are in place, including ones to prevent backsliding, and that SBC Pacific's entry into the in-region long distance market in California is in the public interest. Absent such findings, the Commission should deny SBC Pacific's Application.

III. SBC PACIFIC'S RATES FOR DS1 AND DS3 LOOPS ARE NOT COST-BASED AND THUS SBC PACIFIC HAS NOT MET CHECKLIST ITEM 2

Checklist item 2 requires that a BOC must provide nondiscriminatory access to network elements in accordance with Sections 251(c)(3) and 252(d)(1) of the 1996 Act.[7] This requirement means that a BOC must provide nondiscriminatory access to network elements at technically feasible points on *rates*, terms, and conditions that are just, reasonable, and nondiscriminatory, *and* that are in accordance with the pricing standard in Section 252(d)(1).[8] At this stage in the development of telecommunications competition, the obligations imposed by checklist item 2 regarding UNE pricing are arguably *the* most important obligations created by the Act. Access to UNEs at TELRIC-compliant prices, especially for loops, is vital to CLECs' ability to break into markets still largely monopolized by ILECs like SBC Pacific because CLECs simply cannot replicate the ILECs' century-old loop plant overnight.

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[7] 47 U.S.C. §§ 251(c)(3) and 252(d)(2).

[8] 47 U.S.C. § 271(c)(2)(B)(ii). *See, e.g., Application by Verizon New Jersey, Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in New Jersey*, FCC 02-189, WC Docket No. 02-67 (June 24, 2002) ("*Verizon NJ 271 Order*") at para. 14.

In California, SBC Pacific's existing DS1 and DS3 UNE loop rates are so high as to constitute a clear economic barrier to market entry, and place an untenable burden on XO's ability to expand its market presence in the state. Supposedly, SBC Pacific's DS1 and DS3 UNE loop prices are "forward-looking" and TELRIC-compliant. Yet, SBC Pacific's DS1 UNE loop prices are *60%-100% more than* the level of DS1 UNE loop prices charged by SBC's Ameritech operating companies, and SBC Pacific's DS3 UNE loop price is *more than three times* the DS3 UNE loop price charged by SBC's SWBT unit in Texas. These disparities are so large *on their face* that no one could seriously contend that SBC Pacific's DS1 and DS3 UNE loop prices are TELRIC-compliant.

Indeed, SBC Pacific's DS3 UNE loop price is very likely the highest price charged by any BOC in the nation. SBC Pacific states that the "current DS-1 and DS-3 rates in California were carefully scrutinized by the CPUC and set in accordance with TELRIC methodology."[9] However, the CPUC specifically determined "that the costs of this [DS3] UNE were *never examined* in the prior OANAD proceeding using a forward-looking, TELRIC analysis."[10] Moreover, the CPUC concluded, "given the competitive importance of the DS-3 loop and the fact that a cost-based rate for this UNE has never been set, now is the appropriate time to examine DS-3 loop costs."[11] SBC Pacific's claim that the CPUC carefully scrutinized and set a TELRIC-compliant DS3 UNE loop rate is therefore clearly false.

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[9] *Brief in Support of Application by SBC for Provision of In-Region InterLATA services in California*, WC Docket No. 02-306 (Sept. 20, 2002) ("Brief"), Appendix A, Affidavit of Linda S. Vandeloop at 27 ("Vandeloop Affidavit").

[10] *Scoping Memo For Consolidated 2001/2002 Unbundled Network Element (UNE) Reexamination For Pacific Bell Telephone Company*, CPUC proceeding A.01-02-024/A.01-02-035 (June 12, 2002) at 6-7 (emphasis added).

[11] *Id.*

Moreover, as set forth in more detail below, given the large gap between the DS1 and DS3 UNE loop rates of SBC Pacific and those of SBC Ameritech and SWBT, any claim that SBC Pacific's DS1 and DS3 UNE loop prices are in accord with the pricing standard in Section 252(d)(1) is wholly unpersuasive. In fact, SBC Pacific does not seriously contend otherwise. Although it has offered the predictable *pro forma* arguments that its DS1 and DS3 UNE loop prices satisfy the Section 252(d)(1) pricing standard, SBC Pacific betrays its awareness that these arguments will prove unpersuasive. Indeed, SBC Pacific is so keenly aware of how suspect its current DS1 and DS3 UNE loop prices are that, amazingly, before XO or any other CLEC has filed *even one word* at this Commission, SBC Pacific has offered a true-up retroactive to the date of its Application (September 20, 2002). This is a rather remarkable step. SBC Pacific has proposed a retroactive true-up for rates that have never been found to be TELRIC-compliant. Thus, SBC Pacific is asking this Commission to accept, in lieu of its offering TELRIC-compliant prices *now*, its promise that it will "true-up" DS1 and DS3 UNE loop prices at some indefinite date. Given the vagaries and unpredictability of state regulatory action, such a date may come years from now, if at all, well after SBC Pacific has gained interLATA authority and successfully crushed much, if not all, of its local exchange competition.

This Commission should view SBC Pacific's true-up offer with the greatest skepticism because a true-up offer is insufficient to establish that SBC Pacific is in current compliance with the Act. The Act does not say that BOCs may charge what they like for UNEs now and then true-up their UNE prices later, when, and if, state regulatory commissions have finally wrestled them to the mat (possibly only after years of litigation). Rather, the Act reflects the determination that *present* UNE prices must be in compliance with the Section 252(d)(1) standard. The present – and substantial – harm to competition from non-TELRIC-compliant

UNE prices cannot be overlooked, and will not magically be undone years from now, when and possibly if a state regulatory commission completes its review of UNE prices.

As set forth below, the Commission should find that Pacific's DS1 and DS3 UNE loop rates are not TELRIC-compliant and that Pacific's proposal for a retroactive adjustment of the current California prices to prices adopted in the future is not *now* sufficient to solve the anti-competitive effects of its present DS1 and DS3 UNE loop prices. The Commission accordingly should reject SBC Pacific's Application for failure to satisfy checklist item 2 and condition future approval of any refiled application upon SBC Pacific's implementation of substitute DS1 and DS3 UNE loop prices from Pacific's own chosen benchmark state, Texas.

A. SBC Pacific's Rates for DS1 and DS3 Loops Are Not Cost-Based and Constitute a Barrier to Entry

XO depends critically on DS1 and DS3 UNE loops provided by incumbent carriers in order to enter new markets and expand its customer base. XO uses these UNEs to reach the premises of its new customers and to continue to serve them until it can acquire or build alternative facilities. SBC Pacific's DS3 UNE loop price is far higher than the UNE prices charged by any other SBC carrier in any state, and is not geographically deaveraged, unlike the DS3 UNEs in *all* of SBC's other states.[12] Although not the highest rate in the country, SBC Pacific's DS1 UNE price is likewise excessive, from 60% to over 100% higher than the prices charged by SBC Ameritech. Given XO's and other CLECs' critical dependence on DS1 and DS3 facilities, such high rates constitute a significant barrier to entry.

In its Application, SBC Pacific claims that Texas is comparable to California for ratesetting purposes. Specifically, SBC Pacific has claimed that the Commission can rely on

[12] Indeed, even SBC Pacific's federally tariffed DS3 rates are geographically deaveraged.

SWBT's Texas UNE rates to benchmark Pacific's UNE prices. Citing several previous Commission Section 271 orders that made direct rate "benchmark" comparisons among state-specific UNE prices, Pacific submitted an analysis on current UNE-Platform pricing in California and Texas.[13] The analysis shows the Pacific's California UNE loop, combined non-loop UNEs, and overall UNE-P prices are, respectively, 28%, 30% and 33% lower than the comparable rates in Texas.[14] Although filed for purposes of a UNE-P price comparison, the Makarewicz Affidavit makes no differentiation between the UNE-P components and other loop facilities, such as DS1 and DS3 UNE loops:

> [T]he two states share certain demographic and geographic features, including metrics that influence telephony costs. Table 1 shows demographic and geographic statistics for California and Texas. California and Texas are the two most populous states (metric 1), and have the second and third largest land areas behind Alaska (metric 4). The states both host large numbers of densely populated urban areas (metrics 5&6); metrics depicting density characteristics affect telephony costs. Statewide average loop costs, for example, are largely determined by outside plant facility costs in population centers. To the extent that two states' populations are centered in urban areas, those states' average loop costs will be largely influenced by the urban loop cost averages. The density metrics in Table 1 indicate that this is the case for California and Texas.
>
> The third reason that Texas is an appropriate benchmark state is that the rate structures in place in Texas and in California are similar. As SBC's benchmark analysis…indicates, the rates in Texas and California are easily compared since the rate structures have been established in a similar manner. ….
>
> The fourth (and most significant) reason that Texas is an appropriate benchmark state is that the FCC has already found the rates in Texas to be TELRIC compliant.

[13] Brief, Appendix A, Affidavit Of Thomas J. Makarewicz ("Makarewicz Affidavit").

[14] Makarewicz Affidavit at 11.

> [Finally,] commenters in the California 271 proceeding argued that Texas was an appropriate benchmark state.[15]

Particularly compelling in this analysis is Mr. Makarewicz's determination that the extent of urban population centers and population density in California is sufficiently similar that outside plant loop characteristics are similar. Table 1 in the Makarawicz affidavit actually shows that the population density in California largest cities is almost 2.4 times *greater* than the density in Texas cities. Thus, given that rates typically should be lower in higher density areas, Mr. Makarewicz's analysis, if anything, renders the comparison of DS1 and DS3 UNE loop prices in California with those in Texas even more striking:

SBC CALIFORNIA – SBC TEXAS RATE COMPARISON FOR DS1 & DS3 LOOP UNES

ZONE	**1**	**2**	**3**
SBC PACIFIC – CA DS1	$90.27	$98.23	$119.50
SBC Texas DS1	$76.22	$75.81	$76.96
Percentage difference	18%	30%	55%
SBC Pacific – CA DS3	$1837.18	$1837.18	$1837.18
SBC Texas DS3	$665.49	$915.58	$966.93
Percentage difference	176%	101%	90%

The reasonableness of using the Texas prices as a benchmark for California is evident in comparison to the corresponding prices in effect in SBC's five Ameritech states:

SBC TEXAS RATES ARE SUBSTANTIALLY HIGHER THAN THE SBC AMERITECH STATES

ZONE	**1**	**2**	**3**
RATES FOR SBC AMERITECH DS1	$56.46	$58.35	$58.21
Percentage difference to SBC Pacific	60%	68%	105%

[15] Makarewicz Affidavit at 5-7 (footnotes and tables excluded).

ZONE	**1**	**2**	**3**
RATES FOR SBC AMERITECH DS3	$663.08	$810.38	$825.07
Percentage difference to SBC Pacific	177%	127%	123%

This analysis clearly shows that SBC Pacific's DS1 and DS3 loop rates are not cost-based. Consequently, SBC Pacific has not met checklist item 2. For this reason, the Commission should reject SBC Pacific's Application.

B. Retroactive Rate Adjustments for DS1 and DS3 UNE Loops are Insufficient To Meet the Requirements of Checklist Item 2 and Do Not Avoid Harm to Competition Now

Apparently recognizing that the current California digital loop rates are a serious problem, SBC Pacific states that it will undertake a retroactive true-up of the DS1 and DS3 prices after the CPUC completes its review, effective as of the date of its Application.[16]

As a threshold matter, SBC Pacific's retroactive adjustment proposal is inadequate because it appears to be tied to this Commission's review of SBC Pacific's Section 271 application. As noted above, SBC Pacific has known since June 2002 that the CPUC would review SBC Pacific's DS1 and DS3 loop UNE prices, but it unveiled the proposed retroactive adjustment only concurrent with the filing of its federal Application on September 20, 2002. It is not clear how the September 20 date would be affected if the Commission delays the current timeline for its review, as has occurred with other Section 271 applications, or if the Commission were to reject the application.

Moreover, SBC Pacific's gesture, for several reasons, is entirely inadequate to remedy the problem of SBC Pacific's exorbitant DS1 and DS3 loop rates. A retroactive true-up of SBC Pacific's DS1 and DS3 UNE loop rates will not cure the substantial economic hardship that XO

and other CLECs have suffered, and continue to suffer, since these prices went into effect. The unexamined DS3 loop prices have been in effect since November 1999 and will not be changed by the CPUC until sometime between June and September 2003 at the earliest - at least 46 months, or almost four years after these rates went into effect. During this entire period, XO and other CLECs have had to pay the exorbitant California prices, facing a poor choice between foregoing serving some new customers or draining cash and other resources to try to expand their market. Indeed, the June or September 2003 concluding dates for the CPUC's UNE reexamination proceeding are tentative at best, and the target date may have to be extended, as many events – not foreseeable at this time – could delay the proceeding even further.[17] XO and other CLECs will continue to experience an inability to compete using DS-1 and DS-3 loop facilities as well as a severe cash drain while waiting for the completion of the California rate review, paying the excessive prices until an uncertain time when the retroactive price adjustments will take place.[18]

The DS1 and DS3 UNE loop prices in California are even more outdated than the 46-month figure noted above would suggest. The actual cost data set used by SBC Pacific to calculate these rates were based on 1994 information. It will be nearly a decade old by the time

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16 Vandeloop Affidavit at 27-28.

[17] For example, in June 2002, the CPUC established the *interim* rates for basic loops, switching and ports in A.01-02-024 *et al*. partly because the proceeding had already been underway for 14 months, yet still had no readily foreseeable end. CPUC D.02-05-042 ("Interim UNE Pricing Decision") That first UNE reexamination phase is now certain to run for at least another year since the interim rates were set. It is no wonder that the CPUC's President recently testified that "California's economic downturn is reducing competition for local service;" that incumbents remain dominant in all telecommunications markets; and that "true competition remains an elusive goal for many telecommunications services in California." See Pres. Lynch Senate Testimony.

[18] Any possible retroactive true-up may not even occur if SBC Pacific's Section 271 application is not granted by the Commission – a distinct possibility given SBC Pacific's ongoing problems satisfying several checklist items and its failure to meet its Performance Measures.

new, permanent prices can be set. SBC Pacific developed its original TSLRIC cost levels in 1994.[19] These studies were "converted" to TELRIC costs by the addition and subtraction of CPUC-ordered aggregate sums of money to various "buckets" rather than by a re-working of any service-specific data.[20] Except for these aggregate adjustments, the service-specific underlying demand volumes, technology and spare capacity assumptions remained rooted in the 1994 view. SBC Pacific notes that among the CPUC's adjustments were changes in the spare capacity assumed to be allocated to DS1 and DS3 entrance facilities,[21] but makes no such reference to such adjustments in DS1 and DS3 UNE loop prices. Again, the CPUC's adjustment to the spare capacity for these entrance facilities was not based upon a direct, quantitative adjustment reflecting California's explosive growth in telecommunications traffic since 1994.

Meanwhile, as the UNE costs and rates have grown staler and staler, SBC Pacific has been able to change its equivalent special access retail prices many times, and to offer term and volume discounts that frequently establish retail prices well *below* the UNE prices. The special access DS1 or DS3 channel termination is the equivalent of the facility a collocated CLEC gets when it purchases a DS1 or DS3 UNE loop. SBC Pacific's interstate DS1 and DS3 special access tariff sheets, for example, have been revised between five and nine times in the last few years.[22] Currently, a retail customer taking advantage of three year term pricing for the channel termination enjoys prices that are 40% to 45% below the DS3 UNE loop rate for one circuit and

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[19] *See* Brief*,* Appendix A, Affidavit Of Richard L. Scholl ("Scholl Affidavit") at 5-6, paras. 16-17. Mr. Scholl's Attachment B "Pacific Bell Cost Studies Unbundled Network Elements and Resale" shows that the first TSLRIC studies were filed in December 1995 and January 1996, based on the 1994 data.

[20] *See* Scholl Affidavit at 14-27, paras. 42-71 (generally discussing the aggregate adjustments made by the CPUC to attempt to conform to the Commission's TELRIC principles).

[21] Scholl Affidavit at 23, para 53.

[22] Tariff FCC No. 1, Section 7.5.9.

52% to 56% below the DS3 UNE loop price for three circuits. Under the five-year term plan, SBC Pacific's retail tariff prices are 48% to 51% lower than the DS3 UNE loop for one circuit and 58% to 61% lower for three DS3 circuits. A retail customer buying a DS1 circuit under SBC Pacific's "Fiber Advantage"[SM] retail volume and term pricing, obtains prices that are equal to or as much as 25% (by zone) below the DS1 UNE loop prices – even though the TELRIC based UNE prices are supposed to exclude, among other things, retail costs. If the retail customer commits to a 5-year term, it always gets better prices than one of SBC Pacific's competitors – 11% to 33% below the UNE price.[23] It bears repeating that the underlying retail and UNE services compared here are functionally equivalent – consisting of a facility running between a location of a SBC Pacific or CLEC customer and the central office termination of that link. Thus, a UNE that acts as an essential component of XO's or other CLECs' ability to reach a new or existing customer is frequently priced by SBC Pacific above its retail rate. If there were some *de facto* separation between SBC Pacific retail operations and the wholesale inputs to those operations, SBC Pacific's retail pricing would not be economically viable. This is the classic definition of a price squeeze. The Commission can and should consider whether a price squeeze exists in deciding whether authorization for entry into the long distance market is "consistent with the public interest," as required by Section 271(d)(3)(C).[24]

While XO and other CLECs continue to pay the excessive prices until an uncertain time when the retroactive price adjustments will take place,[25] Pacific will continue to offer *retail*

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[23] *Id.*

[24] *See Sprint Communications Co. L.P. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001).

[25] Any possible retroactive true-up may not even occur if SBC Pacific's Section 271 application is not granted by the Commission – a distinct possibility given SBC Pacific's ongoing problems satisfying several checklist items and its failure to meet its Performance Measures.

prices for the equivalent access services that are in many instances actually *lower* than the UNE prices. A mere retroactive adjustment will not cure the obvious price squeeze that currently exists with respect to DS1 and DS3 UNE loop prices and Pacific's retail rates.

For the foregoing reasons, SBC Pacific's proposed retroactive true-up of DS-1 and DS-3 prices will not alleviate the harm currently suffered by competitors and will not allow SBC Pacific to come into compliance with checklist item 2 and will not. Accordingly, SBC Pacific's Application should be rejected.

C. In Order to Establish Compliance with Checklist Item 2, SBC Pacific must Adopt Interim Rates for DS-1 and DS-3 Loops in California at Least as Low As SBC's DS-1 and DS-3 Rates in Texas

As discussed above, SBC Pacific itself argues that the Commission can rely on SWBT's Texas UNE rates to benchmark Pacific's UNE prices. Although SWBT's Texas DS1 and DS3 rates are by no means the lowest among the SBC operating companies, and are well above the UNE prices of other non-SBC ILECs, SBC Pacific should extend its California-Texas "benchmark" analysis to DS1 and DS3 loops by immediately implementing the Texas DS1 and DS3 prices as interim prices in California, pending the outcome of the CPUC's current reexamination of DS1 and DS3 UNE loop prices in A.01-02-024 *et al*. A retroactive adjustment would then be appropriate, but implementing the Texas prices now would alleviate the impairment of competition that occurs under the *status quo,* as well as the cash drain for XO and other CLECs. In addition, a true-up provision will protect both Pacific and CLECs from any adverse economic impact from the interim rates.

XO believes that implementation of the Texas DS1 and DS3 UNE loop prices even on an interim basis subject to true-up is a necessary step toward bringing SBC Pacific's rates for DS1

and DS3 UNE loops into compliance with checklist item 2.[26] Once SBC Pacific has implemented such rates in California, it could then refile its Application.

IV. SBC PACIFIC HAS FAILED TO PROVIDE NONDISCRIMINATORY ACCESS TO PROVISIONING, MAINTENANCE AND REPAIR AND THEREFORE DOES NOT MEET CHECKLIST ITEM 4

Checklist item 4 requires that the BOC provide nondiscriminatory access to unbundled local loops.[27] SBC Pacific's own data indicate that SBC Pacific has not met this requirement because the data show that SBC Pacific is providing sub-standard provisioning, maintenance and repair of UNE loops. SBC Pacific's attempts to dismiss its failures by describing its performance as "'minimal' disparity"[28] or as *moving closer to* statistical parity,[29] as well as SBC Pacific's promises of *future* compliance, should be treated as little more than background noise. The clear message of SBC Pacific's data is that SBC Pacific's performance does not meet the required standard. The fact that a disparity exists compels the Commission to find that SBC Pacific has failed to comply with Section 271.

SBC Pacific's performance measurement data, as obtained through SBC Pacific's Performance Measure results obtained via SBC Pacific's CLEC Website, from May through August 2002 show a trend of failure and not improvement as SBC Pacific would have the Commission believe. For instance, SBC Pacific failed to reach and maintain parity with respect to DS1 loop orders placed in jeopardy. Specifically, SBC Pacific met the performance measure in May, but then placed more CLEC DS1 loop orders in jeopardy than retail orders in June, July

[26] The CPUC has now consolidated its "Year 2001" UNE reexamination proceeding with the "Year 2002" UNE reexamination proceeding in an effort to streamline what promises to be a protracted proceeding for review of UNE prices that were grossly excessive when established in D.99-11-050 in 1999.

[27] 47 U.S.C. § 271(c)(B)(iv).

[28] Brief at 56.

and August.[30] Thus, the trend appears to be that of poorer service, not improvement. Similarly, SBC Pacific failed to achieve parity with respect to Due Dates Missed for CLEC DS1 loop orders for the North region in June and July, two of the four months reviewed, or 50% of the time.[31]

SBC Pacific's maintenance and repair record similarly shows that SBC Pacific is not performing at parity. Instead, in May, June and August, CLEC 2/4 wire loop customers experienced a higher frequency of repeat troubles within the first 30 days of service than SBC Pacific retail customers.[32] Compared to similar SBC Pacific retail customers, in May and July a higher percentage of CLEC DS1 loop customers in the North experienced service interruptions during the first 30 days of service[33] and more DS1 loop customers statewide did not have their service restored within the estimated time in May, June and August.[34] Also disturbing is the fact that in May, June, July and August, it took SBC Pacific longer to restore the service of CLEC DS1 loop customers than SBC Pacific's retail DS1 loop customers.[35] Clearly, the trend here is not of performance improvement.[36]

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[29] Brief at 63.

[30] Performance Measure 5, Percentage of Orders Jeopardized, for May, June, July and August 2002.

[31] Performance Measure 11, Percent of Due Dates Missed, for May, June, July and August 2002.

[32] Performance Measure 23, Frequency of Repeat Troubles, for May, June, July and August 2002.

[33] Performance Measure 16, Percentage Troubles in 30 Days for New Orders, for May, June, July and August 2002.

[34] Performance Measure 20, Percentage of Customer Trouble Not Resolved within the Estimated Time, for May, June, July and August 2002.

[35] Performance Measure 21, Average Time to Restore (in hours), for May, June, July and August 2002.

[36] SBC Pacific tries to dismiss its poor performance by claiming that CLEC DS1 customers are out of service on average less than one hour longer than SBC Pacific's retail DS1 customers. A miss of a measure, especially four out of four months, is still a miss and is discriminatory treatment.

In seeming recognition that its performance does not comply with the requirements of Checklist item 4, SBC Pacific has provided an affidavit dedicated to SBC Pacific's plans for performance improvement. Many of the plans outlined in the affidavit have not been implemented yet. Of the plans that have been implemented, their effectiveness is suspect at best, considering they are discussed in the context of SBC Pacific's continued failures.

For instance, SBC Pacific offers two means of curing its failures for DS1 installations under Performance Measure 16, Percentage of Troubles on New Orders in 30 Days.[37] SBC Pacific claims that its HANSEL testing, a process of testing the circuit within 30 days after installation, is part of its "standard procedures" and is designed to reduce trouble reports within the first 30 days of service. The data indicate, however, that such testing is inadequate to ensure the required level of performance. Similarly unpersuasive are SBC Pacific's claims that it plans to improve its performance by reinforcing training, specifically by re-training PCO technicians to actually enable the DS1 facilities when the CLEC is ready to accept the circuit and to identify the circuit at the MPOE so that the CLEC can perform its work properly. SBC Pacific does not say whether this re-training has begun or to what extent it will occur. If it is in place, it does not appear to be working. If it is yet to begin, then it is an unproven method that conceivably could fail leaving SBC Pacific to continue to miss Performance Measure 16.[38]

Regarding the maintenance of DS1s, SBC Pacific claims that it already has implemented several measures that will correct its failures of Performance Measures 20, Percentage of

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[37] Brief, Appendix A, Affidavit of Richard J. Motta ("Motta Affidavit") at 24-26, paras. 45 – 49. SBC Pacific first, however, lays blame with CLECs, stating that SBC Pacific's failures are due to CLEC's lack of testing. SBC Pacific says that there is "evidence" of this, but offers none.

[38] Indeed, it is remarkable that at this point in time SBC Pacific has to re-train its technicians to both enable circuits and to tag circuits at the MPOE. Both of these tasks are fundamental to the operability of UNE loops and the fact that these tasks are not being performed only further proves that SBC Pacific's

Customer Trouble Not Resolved Within Estimated Time, and Performance Measure 21, Average Time to Restore.[39] Specifically, SBC Pacific claims that its maintenance centers now give priority to DS1 trouble tickets. SBC Pacific in fact asserts that this measure is already working, citing improvement for Performance Measure 20 in July. SBC Pacific's data, however, show that SBC Pacific's performance slid back to that of May and June when SBC Pacific missed Performance Measure 20 in August. Additionally, SBC Pacific continued to miss Performance Measure 21, having missed it in May, June, July and August. Contrary to SBC Pacific's claims, SBC Pacific's efforts here, as well as its performance, are failing.

SBC Pacific's claims regarding efforts to improve performance with respect to repeat troubles on basic UNE loops (2/4 wire) are also less than compelling.[40] SBC Pacific claims that it has upgraded its processes and trained its staff from May through September of this year. It also states that, as a result of root cause analysis performed in 2001, SBC Pacific developed and implemented the "FIT" process as a measure to reduce maintenance issues. Finally, SBC Pacific says that it changed its process so that CLEC trouble tickets receive priority.[41] Yet, even with these efforts already in place, efforts that are specifically designed to improve performance, SBC Pacific missed the standard for Performance Measure 23, Frequency of Repeat Troubles, having failed in May, June and August.

There obviously are no guarantees that SBC Pacific's promised improvement plans will work (or have been working) to bring SBC Pacific to parity. At this point, these plans simply are

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performance does not rise to the level that section 271 demands.

[39] Motta Affidavit at 26-27, paras. 50-51.

[40] Motta Affidavit at 13-15, paras. 25-29.

[41] In addition, with the lack of a performance incentive plan in California that will prevent backsliding, this is no guarantee that CLEC trouble tickets will continue to receive priority, further exacerbating SBC Pacific's poor performance.

paper promises, promises of future performance that likely will never be realized. As this Commission has stated, "promises of *future* performance to address particular concerns raised by commenters have no probative value in demonstrating its *present* compliance with the requirements of Section 271."[42] Until SBC Pacific can demonstrate that it meets critical performance measures, the Commission does not have any basis for concluding that parity exists. Accordingly, the Commission should find that, by offering paper promises and not actual compliance, SBC Pacific fails to meet the requisite showing to establish compliance with Checklist item 4.[43]

Indeed, SBC Pacific's failure to demonstrate compliance with respect to DS1 provisioning and maintenance and repair warrants rejection of SBC Pacific's Application because DS1 facilities are critical to local competition. XO and other CLECs use DS1s to provision many different types of services to end-users, and therefore have the potential to purchase significant amounts of DS1s. As demonstrated above, SBC Pacific's performance failures with respect to DS1 facilities cover practically the end-to-end process – from ordering to installation to maintenance and repair troubles and repeat troubles. With so many critical area

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[42] *In re Application of Ameritech Michigan Pursuant to Section 271*, CC Docket No. 97-137, FCC 97-298, Memorandum Opinion and Order, 12 FCC Rcd 20543 at paras. 55 (Aug. 19, 1997) ("*Ameritech Michigan Order*") (emphasis in original).

[43] There is also further reason to doubt the usefulness of SBC Pacific's promises of future performance in light of the recently announced SBC reduction in work force. Indeed, XO already has begun to feel the effects of these (and earlier) reductions. XO's Account team has been reduced from two to one Account Manager for all 13 SBC states. Additionally, XO has been informed that SBC has taken away cell phones and pagers from of all employees at or below the Director level. As a result, for the past few months, XO employees have been unable to reach SBC Pacific representatives by phone, and instead, have been able only to leave voice messages. The majority of the time, SBC Pacific responds to these messages via emails, not phone calls. Further, SBC Pacific employees recently changed their voice mail messages to inform callers that messages will be returned within four hours. Given that escalations are usually done in emergency situations, such as extended service outages, it seems that SBC has reduced the resources necessary to improve its performance by removing the means by which CLECs can effectively work and communicate with SBC Pacific representatives.

being performed below parity, there is no doubt that SBC Pacific's performance is CLEC customer-affecting.

V. SBC PACIFIC FAILS TO SATISFY CHECKLIST ITEM 11

Checklist item 11 requires that a BOC provide number portability in compliance with the regulations promulgated pursuant to Section 251.[44] The Act defines number portability as "the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of *quality, reliability, or convenience* when switching from one telecommunications carrier to another."[45] In the *Telephone Number Portability Order,* the Commission recognized the importance of number portability for promoting competition by making it less expensive and disruptive for a customer to switch providers, and allowing the customer to choose the provider that offers the best value.[46] Further, the Commission adopted the North American Numbering Council ("NANC") uniform industry provisioning process guidelines establishing procedures for porting numbers, which will "help ensure that communication between and among service providers…proceed in a clear and orderly fashion so that number portability requests are handled in an *efficient and timely* manner."[47] SBC Pacific's number portability processes, however, are inconsistent with these requirements and fail to meet checklist item 11 because (1) SBC Pacific has failed to implement the mechanized number portability administration center ("NPAC") in time for parties to

[44] 47 U.S.C. § 271(c)(2)(B)(xi).

[45] 47 U.S.C. § 153(30) (emphasis added).

[46] *Telephone Number Portability*, FCC 96-286, CC Docket No. 95-116, First Report and Order and Further Notice of Proposed Rulemaking (rel. July 2, 1996) ("*Telephone Number Portability Order*"). Among other things, the Commission established various principles for the number porting process, including that the number portability process "not result in unreasonable degradation in service quality or network reliability when implemented." *See id.* at para. 48.

[47] *Telephone Number Portability*, FCC 97-289, CC Docket No. 95-116, Second Report and Order (Aug.

comment on the efficacy of the NPAC; and (2) SBC Pacific has refused to port numbers in a timely and efficient manner where migrating customers purchase both voice and DSL services from SBC Pacific.

Specifically, the CPUC 271 Decision correctly recognized that SBC Pacific's failure to implement a mechanized NPAC constituted a failure to meet the requirements of providing local number portability pursuant to Section 271(c)(2)(B)(xi). A mechanized NPAC would prevent disconnection of migrating customers' service prior to CLEC activation, prevent customers from losing dial tone in the porting process, and ensure quality, reliability, and convenience for customers switching providers and porting numbers.[48] Although SBC Pacific implemented the mechanized NPAC pursuant to the CPUC 271 decision,[49] the implementation of the mechanized NPAC only occurred at the end of September 2002. SBC Pacific will submit 30 days of operational data on the mechanized NPAC to the CPUC on October 30, 2002.[50] Thus, it is uncertain whether SBC Pacific's mechanized NPAC is operating correctly. This late implementation of the mechanized NPAC will not provide parties sufficient time to comment on this critical feature for purposes of determining whether SBC Pacific has complied with checklist item 11. Accordingly, the Commission lacks a sufficient record for determining that SBC Pacific meets the requirements of checklist item 11.

In addition, SBC Pacific's processes for porting numbers of customers who purchase both voice and digital subscriber line ("DSL") services from SBC Pacific provide another ground

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18, 1997) at paras. 55- 58 (emphasis added).

[48] *See* D.02-09-0505 at 202-205.

[49] D.02-09-050 at 207.

[50] *See* SBC Pacific Bell Telephone Company's Notice of Compliance with Ordering Paragraph 6, in CPUC 271 Proceeding (Sept. 30, 2002).

for finding that SBC Pacific does not meet the requirements of checklist item 11. Specifically, XO has experienced unreasonable delay in SBC Pacific's porting of numbers to XO where the customer purchases both voice and DSL services from SBC Pacific. SBC Pacific will not permit customers who have DSL and voice service with SBC Pacific to port their telephone number to the new carrier for voice services unless and until the customer calls SBC Pacific to cancel their DSL service. This requirement is inconsistent with industry porting interval practices, is anti-competitive, and creates a delay in the porting process.

First, SBC Pacific's requirement that its customers cancel their DSL service prior to porting their numbers for voice services is simply unsupported by industry or NANC guidelines. There is nothing in the NANC provisioning process flows that requires that a customer contact the carrier to cancel DSL service in order to port a number for voice services. Nor is there any technical basis for SBC Pacific's refusal to port the number to the new provider where a customer purchases both DSL and voice service from SBC Pacific.[51]

SBC Pacific's policy of essentially prohibiting customers from retaining their DSL service with SBC Pacific when they want to switch only their voice services to a new carrier forces customers to make an "all or nothing" choice and therefore is inconsistent with pro-competitive number portability principles. The ultimate effect of SBC Pacific's policy is that customers are forced to either stay with SBC Pacific in order to retain their DSL service, or contact SBC Pacific to cancel DSL services and to migrate service to another carrier, which provides SBC Pacific with a winback opportunity.

[51] To the extent that SBC Pacific might argue that SBC Pacific uses the customer's voice telephone number as a means of billing the customer's DSL service, such an argument is no excuse. Even if this were the case, SBC Pacific must implement a swift and efficient process for adjusting the manner by which it bills the customer for DSL services and SBC Pacific must do so without refusing to port the telephone number to the new carrier unless and until the customer calls SBC Pacific.

Moreover, once customers contact SBC Pacific to cancel DSL service in order to port their telephone numbers, SBC Pacific further delays the porting process until SBC Pacific has processed the DSL disconnect, which in some cases, may take two to three weeks. A porting interval of two to three weeks is significantly longer than current porting intervals of a few days established by general industry practice and guidelines.[52] SBC Pacific's continued refusal to port a telephone number when a customer purchases DSL and voice services from SBC Pacific, is causing XO to lose customers after they have signed contracts with XO for service. Despite XO's discussions with SBC Pacific, there has been no resolution of this matter. Because SBC Pacific's policy conflicts with the Commission's articulated principles of *efficient and timely* porting processes, and is anticompetitive, the Commission should conclude that SBC Pacific does not meet the requirements of checklist item 11.

VI. SBC PACIFIC FAILS TO SATISFY CHECKLIST 14

Checklist item 14 requires that a BOC make telecommunications services available for resale consistent with the requirements of Sections 251(c)(4) and 252(d)(3).[53]

As the CPUC 271 Decision correctly concludes, SBC Pacific has failed to comply with checklist item 14, by failing to make resale of its advanced services or DSL services at a wholesale discount available to CLECs.[54] SBC Pacific asserts that this Commission has not required DSL services to be provided at a wholesale discount where the BOC provides DSL services to its affiliated Internet Service Provider ("ISP").[55] While it is true that this Commission

[52] As the North American Numbering Council (NANC) noted, wireline porting intervals generally take about 3-4 days. *NANC Local Number Portability Administration Working Group, 3rd Report on Wireless Wireline Integration* (Sept. 30, 2000) at section 3.2.

[53] 47 U.S.C. § 271(c)(2)(B)(xiv).

[54] D.02-09-0505 at 227.

[55] Brief at 95-96, *citing Joint Application by SBC Communications, Inc., Southwestern Bell Telephone*

has thus far declined to make a determination that such an offering is required to be provided at a wholesale discount, XO notes that it is simply inconsistent with the D.C. Court of Appeals *ASCENT* decision's findings to conclude anything else. As the CPUC correctly concluded on this issue, the *ASCENT* court found that a BOC may not avoid its resale obligations under Section 251(c) by setting up a wholly owned affiliate to provide those services that it does not wish to provide under Section 251(c).[56] Further, as the CPUC notes, "California is the nation's most populous state," and "there is significant potential for the growth of advanced services here."[57] The failure of SBC Pacific to provide its DSL services for resale to CLECs contravenes Section 251(c), and provides a significant advantage to SBC Pacific in competing for these customers seeking advanced services.[58]

VII. SBC PACIFIC'S ENTRY INTO THE IN-REGION INTERLATA MARKET WOULD BE ADVERSE TO THE PUBLIC INTEREST

In addition to requiring a finding that the Section 271 checklist requirements has been met, the Act requires the Commission to determine that approval of a BOC's long distance entry would "be consistent with the public interest, convenience, and necessity."[59] As noted by the Commission, this finding is separate and distinct from the findings that the Commission is

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Company, and Southwestern Bell Communications Services, Inc., d/v/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Arkansas and Missouri, FCC 01-338, CC Docket No. 01-194, Memorandum Opinion and Order (Nov. 16, 2001) ("*Arkansas/Missouri Order*") at paras. 79-84. The Commission noted in the *Arkansas/Missouri Order* that it has "not addressed the situation where an incumbent LEC does not offer DSL transport at retail, but instead offers only an Internet access service." *Arkansas/Missouri Order* at para. 82. The Commission further noted that it would address these issues in a separate proceeding. *Id*.

[56] *See* D.02-09-050 at 223, *citing Association of Communications Enterprises v. Federal Communications Commission,* 235 F.3d 662, 668 (D.C. Cir. 2001) ("*ASCENT*").

[57] D.02-09-0505 at 226-227.

[58] *See* D.02-09-050 (noting one commenter's observation that the "majority of California ratepayers have no provider choice other than Pacific for DSL access service.")

[59] 47 U.S.C. § 271(d)(3)(C).

required to make under the 14 point checklist.[60] The Commission has further interpreted the public interest requirement as "an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected."[61] Factors that the Commission will and has considered are whether the *markets are currently open to competition*, whether the local and long distance markets *would remain open after grant of an application*, and whether other particular factors or circumstances exist that make entry *adverse to the public interest*.[62]

Given this statutory obligation to review additional factors regarding the public interest of an applicant's Section 271 authorization, this Commission cannot ignore the undeniable evidence on the record supplied by the CPUC and by XO here that granting the SBC Pacific Application would be premature and would inflict significant harm to the status of competition in California.[63] Specifically, the CPUC's record indicates that the local exchange market in California is not fully and irreversibly open to competition; SBC Pacific continues to engage in anticompetitive conduct; and there is little assurance that SBC Pacific will reform its anticompetitive behavior.

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[60] *See, e.g.*, *Ameritech Michigan Order* at paras. 360-66; *Verizon NJ 271 Order*, at Appendix C, para. 71.

[61] *Verizon NJ 271 Order*, Appendix C, at para. 71.

[62] *Verizon NJ 271 Order*, Appendix C, at para. 71, *citing Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana,* FCC 98-271, CC Docket No.98-121, Memorandum Opinion and Order (Oct. 13, 1998) ("*BellSouth Louisiana II Order*") at para. 360.

[63] *See* D.02-09-050 at 268.

A. This Commission Should Incorporate the Findings of the CPUC that SBC Pacific's Section 271 Authorization Would Contravene the Public Interest

California Public Utilities Code Section 709.2 requires the CPUC to make certain findings regarding a BOC's entry into the intrastate interexchange market. As indicated in the CPUC 271 Decision, the CPUC established a significant record regarding the issues raised by California Public Utilities Code Section 709.2. Based on that record, the CPUC expressly found that "we cannot state unequivocally that we find SBC Pacific's imminent entry into the long distance market in California will primarily enhance the public interest."[64] Not surprisingly, SBC Pacific attempts to gloss over these significant and persuasive findings by the CPUC by claiming that they are irrelevant. Nothing could be further from the truth.

It would be folly for this Commission to disregard the CPUC's informed conclusions on this matter. Indeed, it is inconsistent with the Act for this Commission to disregard this evidence on the basis that, as SBC Pacific asserts, the "Commission has no obligation even to consult the state commission regarding the public interest."[65] The Commission has found that it is required by the Act generally to consider all *factors and circumstances* that would frustrate the congressional intent that markets be opened or remain opened to competition, or that would be adverse to the public interest.[66] In this regard, the CPUC's findings on SBC Pacific's Section 271 compliance with Public Utilities Code Section 709.2 are particularly informative.

SBC Pacific even acknowledges that this Commission has recognized that "state commission's knowledge of local conditions and experience in resolving factual disputes affords them a unique ability to develop a comprehensive, factual record regarding the opening of the

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[64] D.02-09-0505 at 4.

[65] *Id.*

[66] *See Verizon NJ 271 Order*, App. C, at para. 71.

BOCs' local networks to competition."[67] As the regulatory entity most knowledgeable about the local conditions of competition in California, the CPUC expressly found in its 271 Decision that local telephone competition "has yet to find its way into the residences of the majority of California's ratepayers."[68] Moreover, the CPUC states that "Pacific's less than complete progress has given California technical, *not actual*, local telephone competition."[69] Finally, the CPUC concludes that "we foresee harm to the public interest if actual competition in California *maintains its current anemic pace*, and Pacific gains intrastate long distance dominance to match its local influence."[70] These findings should not be taken lightly. The fact that the CPUC determined that full and actual local competition has yet to be attained should be considered carefully in this Commission's public interest determination.

Moreover, the CPUC finds that SBC Pacific's entry into the long distance market would be contrary to the public interest, given that: (i) there is no evidence that SBC Pacific has not engaged in anticompetitive behavior; (ii) there is no evidence that SBC Pacific has not engaged, and will not engage, in improper cross-subsidization of intrastate interexchange telecommunications service; and (iii) there is no evidence that SBC Pacific's Section 271 entry does not pose a substantial possibility of harm to the competitive intrastate interexchange market.[71] In sum, the CPUC concluded that there is insufficient evidence to determine that SBC Pacific met three of four requirements of the California Public Utilities Code Section 709.2. As Pres. Lynch notes in her dissent to the CPUC 271 Decision, "[c]ertainly, the state Section 709.2

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[67] Brief at 114, *citing Ameritech Michigan Order* at para. 30.

[68] D.02-09-0505 at 4.

[69] D.02-09-050 at 268 (emphasis added).

[70] D.02-09-050 at 264 (emphasis added).

[71] D.02-09-050, Findings of Fact paras. 320-321, 326, 329-330.

requirements provide a benchmark by which to evaluate the public interest of SBC Pacific Bell's 271 bid."[72] Further, CPUC Pres. Lynch stated that "a 25% success rate for statutorily-mandated criteria is not a passing grade," and "I have reluctantly concluded that I cannot find that it would be in the public interest to support the [CPUC 271] decision as a whole."[73]

Clearly, therefore, the CPUC's findings and conclusions on California Public Utilities Code Section 709.2 are relevant to this Commission's determination as to whether local competition exists and/or will continue to exist, and the impact of Section 271 authorization on the public interest in California.

B. SBC Pacific's Performance Incentive Plan is Inadequate to Prevent Backsliding or Compliance with the Act

As the Commission has noted, the performance remedies plan applicable to an RBOC must provide sufficient assurance that the local market will remain open, once the RBOC receives Section 271 approval.[74] The Commission has considered the following key elements in a performance remedy plan: total liability at risk, performance measurement and standards definitions, structure of the plan, and accounting requirements.

In California, the CPUC adopted a performance incentive plan ("PIP") for SBC Pacific through an extensive proceeding, with the participation of CLECs, ILECs and other interested parties, such as consumer advocates. The proceeding culminated in Decision No. 02-03-023, released in March 2002. Although XO and other CLECs applauded the Administrative Law Judge's and the CPUC's skillful handling of the complicated policy and technical issues inherent in the PIP proceeding, XO remains concerned that certain aspects of the PIP render the plan

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[72] D.02-09-050, Dissent of Pres. Lynch at 3.

[73] *See* D.02-09-0505, Dissent of Pres. Lynch at 2-4.

[74] *See, e.g.*, *Verizon NJ 271 Order* at para. 176.

inadequate to ensure that SBC Pacific will attain performance in compliance with the Act and that SBC Pacific will not "backslide" in its performance.

A significant flaw of the PIP is the method of calculation of incentive payments. Specifically, the calculation of incentive payments results in payments that are so nominal that they amount to little more than a cost of doing business for SBC Pacific. This is due, in part, from the adopted curvilinear relationship between the incentive payment amounts and the number of missed submeasures.[75] Specifically, the PIP employs a nonlinear relationship between the rate of submeasure failure and the percentage of total payment liability. This nonlinear payment schedule requires SBC Pacific to pay only 1% of the total payment liability even though it has missed up to 5% of the submeasures observed per month. This result in fact creates an internal conflict in the PIP, because the CPUC concluded in its Incentives Decision that no mitigation of potential "false positive" or "Type I" errors was needed.[76] The adopted PIP, however, provides exactly such mitigation through the curvilinear relationship. As a result, the PIP does not have the identified requisite characteristics of creating potential liability that provides a meaningful and significant incentive to comply with the designated performance standards or of establishing a reasonable structure that is designed to detect and sanction poor performance when it occurs.

The inadequacy of the PIP is vividly demonstrated by the fact that for the month of April 2002, the plan generated incentive payments in the amount of $673,390 for failure rates of 6.7%

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[75] CPUC D.02-03-023, in R.97-10-016/I.97-10-017, Opinion on the Performance Incentives Plan for Pacific Bell Telephone Company (Mar. 6, 2002) at 41-50 ("Incentives Decision").

[76] Incentives Decision at 22-28. A "Type I" error occurs when OSS processes for ILEC and CLEC customers operate at parity, but random variation produces results as showing inferior service to CLEC customers (or non-parity).

for Category A, 21.6% for Category B, and 11.6% for Category C.[77] This payment equals approximately .05% of SBC Pacific's monthly net return from local exchange service in California.[78] Such a result is nominal at best and will not provide any incentive to SBC Pacific to modify its performance.

Indeed, incentive payments have been in effect since April 2002, yet as described in Section IV above, SBC Pacific is failing to meet numerous critical performance measures. As a result, in its Application, SBC Pacific promises improved performance in the future. The only reasonable conclusion to be drawn is that the incentive payments have already become a cost of doing business and the only reason SBC Pacific is claiming it will improve is to gain 271 approval. Thus, the PIP does not adequately ensure that SBC Pacific will not simply violate the performance measures and make the nominal payments.

In addition, another fundamental problem with the PIP adopted by the CPUC is that payments in a particular month to any CLEC are limited to the amount billed by SBC Pacific to the CLEC in that month, and that any incentive payment amounts over that limit are paid to *Pacific's retail customers* in the form of a surcredit. This is completely contrary to the goal of inducing SBC Pacific to obtain and maintain performance that complies with the Act. Indeed, by implementing a mechanism in the PIP that pays SBC Pacific's customers, the PIP creates a perverse incentive for SBC Pacific to benefit from its poor performance, by being seen in the eyes of its customers as giving them a favorable reduction in their rates.[79] Such an outcome is

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[77] D.02-09-050 at 236.

[78] This calculation is based on the representation in D.02-09-050 of SBC Pacific's net return from local exchange service in California in 2001 as $1.5 billion. *See* D.02-09-050 at 236, n.349.

[79] It is important to note that the PIP also provides for SBC Pacific's retail customers to receive credits resulting from payments SBC Pacific must make for "Tier II" failures, which are failures for CLECs in the aggregate. This too creates the same perverse incentive.

not only contrary to the basic principles underlying a performance remedy plan, but is also clearly ineffective as any sort of backstop against backsliding. There should be no limit on the incentive payments paid to a CLEC. The fact that there is and the manner in which these payments have been implemented should preclude this Commission from finding that the PIP will ensure that SBC Pacific's behavior subsequent to Section 271 entry will be consistent with the Act.

C. SBC Pacific's Prices for DS1 and DS3 UNE Loops Effect a Price Squeeze on Competitors

The D.C. Circuit remanded to this Commission its determination in a recent Section 271 proceeding that a price squeeze was irrelevant to the Section 271 public interest determination.[80] In so doing, the D.C. Circuit observed, among other things, that the Commission should consider whether the BOC's UNE pricing results in a price squeeze that precludes profitable CLEC competition.

Although SBC Pacific contends that any assertions about its UNE prices effecting a "price squeeze" are flawed, there is considerable evidence as discussed above that SBC Pacific's UNE rates for DS1 and DS3 loops effect a price squeeze on CLECs. Specifically, given that SBC Pacific's UNE rates for DS1 and DS3 loops are substantially higher than SBC Pacific's DS1 and DS3 retail prices in certain cases, these UNE rates effectively preclude CLECs from achieving *any profits* at all for certain services and market segments. For example, as noted above, a retail customer that obtains a three-year contract with SBC Pacific for a DS3 channel termination, pays prices that are 40% to 45% lower than the DS3 UNE loop rate for one circuit, and 52% to 56% lower than the DS3 UNE loop rate for three circuits. SBC Pacific's retail tariff

[80] *Sprint Comm. Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001).

prices are even lower for a customer purchasing under the five-year term plan.[81] Accordingly, these UNE rates prevent CLECs from competing for the customers that purchase these services from SBC Pacific. Moreover, because these customers often constitute the more profitable segments of the market, the inability of CLECs to compete for these customers precludes CLECs from competing effectively within the market as a whole. Accordingly, SBC Pacific's DS1 and DS3 UNE loop rates effect a price squeeze on CLECs and are further evidence of why SBC Pacific's Section 271 entry would not be in the public interest.

VIII. CONCLUSION

For the foregoing reasons, SBC Pacific's Application for authorization to provide in-region interLATA services in California should be denied.

Respectfully submitted

/s/

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[81] Under the five year plan, as discussed above, Pacific's retail tariff prices are 48% to 51% lower than the DS3 UNE loop for one circuit and 58% to 61% lower for three DS3 circuits.

October 9, 2002

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